No. 486

# In the Supreme Court of the United States

OCTOBER TERM, 1960

DANTE EDWARD GORI, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## CITATIONS

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### OPINION BELOW

The opinions of the Court of Appeals are not yet reported (Pet. 5a, 24a).

### JURISDICTION

The judgment of the Court of Appeals was entered on July 22, 1960, and a petition for rehearing was denied on August 18, 1960. Mr. Justice Harlan extended the time for filing a petition for writ of certiorari to and including October 17, 1960, and the petition was filed on October 15, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether, following a mistrial declared by the district judge *sua sponte,* petitioner could be retried.

2. Whether the procedure adopted by the Court of Appeals in hearing petitioner's appeal *en banc* was proper.

## STATEMENT

Petitioner was charged in the United States District Court for the Eastern District of New York with the crime of receiving and having possession of goods stolen in interstate commerce, knowing the same to have been stolen (18 U.S.C. 659). During the presentation of the government's case, on the first day of trial, February 4, 1959, District Judge Abruzzo, *sua sponte,* declared a mistrial for what he characterized as misconduct of the United States Attorney.[1]

On March 9, 1959, petitioner moved to dismiss the information on the grounds of double jeopardy. The motion was denied on March 26, 1959. Petitioner was retried in April, 1959, found guilty, and sentenced to imprisonment for three and one-half years.

On appeal, the sole question raised was whether petitioner's retrial constituted double jeopardy. Argument was heard by a panel consisting of Circuit Judges Clark and Waterman and Circuit Judge Lewis of the Tenth Circuit (sitting by designation). In a preliminary draft opinion, Judges Waterman and Lewis voted to reverse and Judge Clark voted to affirm the conviction. The divergent draft opinions

[1] The proceedings leading up to the declaration of mistrial are set forth on pages 6–7 of the petition for writ of certiorari. All the judges in the court below were of the view that the prosecutor had not committed any act of misconduct.

were circulated among the active judges of the court, and a majority of these judges, "believing that the case presented a general problem important to the administration of justice" in the Second Circuit, voted to dispose of the appeal *en banc*. Judge Lewis, not being a member of the Court of Appeals for the Second Circuit, was excused from further participation. On July 22, 1960, the Court of Appeals *en banc*, by a 4–1 vote, affirmed the conviction.

## ARGUMENT

1. Petitioner himself states that the basic rules which determine the issue "are plain" (Pet. 10). It is well established that, even though a defendant has been on trial before a jury and in that sense in jeopardy, he may be retried after the trial judge has declared a mistrial in the interest of justice, as, for example, where it is discovered during the course of a trial that a juror may be biased. *Thompson* v. *United States*, 155 U.S. 271; *Simmons* v. *United States*, 142 U.S. 148. And see *Wade* v. *Hunter*, 336 U.S. 684; *United States* v. *Perez*, 9 Wheat. 579. In our view, the decision below correctly applies this settled principle to a special set of facts, and further review is not warranted.

*a.* In this case, the trial judge declared a mistrial apparently because he believed that the prosecutor was about to engage in a line of questioning which would be prejudicial to the defendant (see opinion of the court below, Pet. 9a–10a). The judges below were of the view that the prosecutor had not engaged in any misconduct and that the district judge had been "over-

assiduous" in his efforts to safeguard "the rights of the accused" (Pet. 10a). But whether in this particular case the trial judge had tenable reasons for declaring a mistrial or whether (as we believe) he erred on the side of solicitude for the defendant, we submit (1) that the freedom of the district judge to make the judgment whether the trial ought continue—a matter traditionally within his broad discretion (*Wade* v. *Hunter, supra; United States* v. *Perez, supra*)—is to be encouraged and preserved, and (2) that the exercise of this discretion by the district judge, whether he acts with questionable judgment or with unimpeachable wisdom, should not serve (at least in the absence of most exceptional circumstances) to defeat the judicial process and to immunize the defendant from the necessity of having his guilt or innocence determined.

This view does not involve a conflict with the prohibition against double jeopardy. As this Court stated in *Green* v. *United States*, 355 U.S. 184, 187–188, the rationale of the constitutional prohibition is that:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty.

Petitioner is not, either in the traditional sense or in any meaningful sense, a victim of double jeopardy; he has not been harassed by the government through

unjustified and constant persecution after the government failed to prove guilt on the first attempt. To the contrary, the government was never given the chance to prove its case in the first trial, even though it was prepared to do so. Petitioner's "valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Wade* v. *Hunter*, 336 U.S. 684, 689.

*b.* Petitioner, relying on the dissent below, suggests that if the ruling of the trial judge with respect to the necessity for a new trial be accepted, then the assumed cause of that ruling—misconduct of the prosecutor—must also be accepted. He then argues that, whenever a mistrial results from the conduct of the prosecutor, a defendant cannot be retried unless he himself has affirmatively waived double jeopardy by moving for a mistrial. This argument attempts to do what this Court in *Wade* v. *Hunter*, 336 U.S. 684, 691, said should not be done—to codify the rules of manifest necessity and double jeopardy into a rigid abstract formula. With respect to the suggestion (based on *Cornero* v. *United States*, 48 F. 2d 69 (C.A. 9), cited by petitioner (Pet. 14–16)) that absence of witnesses can never justify discontinuance of a trial, this Court said (336 U.S. at 691):

> Such a rigid formula is inconsistent with the guiding principles of the *Perez* decision to which we adhere. Those principles command courts in considering whether a trial should be terminated without judgment to take "all circumstances into account" and thereby forbid

the mechanical application of an abstract formula. The value of the *Perez* principles thus lies in their capacity for informed application under widely different circumstances without injury to defendants or to the public interest.

We suggest that the same flexibility must govern the determination whether a retrial is permissible. We do not believe that any slip by a prosecutor which might induce the presiding judge to conclude that it was best to declare a mistrial should carry the consequence that guilt is never to be determined. If there is reason to believe that a prosecutor has deliberately provoked a mistrial in order to prevent an unfavorable verdict, it might, in that circumstance, be proper to hold that the mistrial was for the convenience of the prosecution[2] and represented the type of harassment which the double jeopardy clause was designed to prevent. But since admittedly there is no basis here for suggesting that the prosecution deliberately provoked a mistrial, there is no occasion to speculate as to the circumstances in which misconduct by the prosecution might conceivably be deemed to bar a second trial. It is enough to note that this Court has clearly rejected the type of rigid formula which petitioner suggests and that here there is no reason whatever to impute improper motives to the prosecution.

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[2] The cases which held that retrial, following a mistrial, was barred were cases in which the mistrial was for the convenience of the prosecution, *e.g.* where the prosecutor entered a *nolle prosequi* because his evidence was insufficient (*Clawans* v. *Rives*, 104 F. 2d 240 (C.A. D.C.)), or where the prosecution proceeded without having all its witnesses present (*Cornero* v. *United States*, 48 F. 2d 69 (C.A. 9).

*c.* The question of waiver by consent does not play a part in this case. Of course, if petitioner had moved for a mistrial, he would have waived the possibility of a plea of double jeopardy.[3] A judge, however, may declare a mistrial in the interests of fairness or necessity, even over the objection of a defendant.[4] This is clear from *Simmons* v. *United States,* 142 U.S. 148, 150, where this Court upheld a retrial after a mistrial declared over the express objection of the defendant. See, also, *Scott* v. *United States,* 202 F. 2d 354 (C.A. D.C.), certiorari denied, 344 U.S. 879. If the rule were otherwise there could be a multiplication of situations, such as that presented in *Scott,* where a defendant claiming serious disadvantage from a ruling nonetheless refuses to move for a mistrial (presumably hoping to secure a reversal on appeal in the event of a conviction). A trial judge must be the ultimate arbiter. The function of determining whether a fair trial is possible cannot be delegated either to the prosecution or to the defense. Accordingly, it cannot be deemed dispositive that the district judge's declaration of a mistrial is made *sua sponte,* rather than on motion by the defendant. As this Court said in *Wade*

[3] That obviously is what the court below referred to when it said (Pet. 10a): "We have the issue, therefore, whether active and express consent—something beyond acquiescence—is required to prevent this defendant, now convicted after a concededly fair trial, from receiving absolution for his crime by reason of the overzealousness of the trial judge on his behalf." In other words, the court below was holding that there could be a new trial without the active consent represented by a motion for a mistrial.

[4] In this case, the defendant did not object.

v. *Hunter*, 336 U.S. 684, 688–689, the constitutional right against double jeopardy does not mean that

> every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed.

2. Petitioner complains of the fact that this case was taken from the panel to which it was originally assigned and determined by the Court of Appeals sitting *en banc*. There is no question, however, that the determination to decide the case *en banc* was made by the majority of the active judges of the circuit, in literal compliance with 28 U.S.C. 46(c) (reprinted at Pet. 5). The administrative mechanics by which the determination was made was, of course, a matter for the Court of Appeals. *United States* v. *American-Foreign S.S. Corp.* 363 U.S. 685; *Western Pacific Railroad Corp* v. *Western Pacific Railroad Co.*, 345 U.S. 247.

Nor is there substance to petitioner's complaint that the court, sitting *en banc*, did not schedule a second oral argument. There is no constitutional right to oral argument and, as this Court has observed (*American-Foreign Case, supra*, 363 U.S. at 692), it "is not an unknown phenomenon in federal adjudication that a case, though heard by less than the entire tribunal, may be decided according to the majority vote of all." In this instance, the Court of Appeals observed (Pet.

26a) that it appeared that "the researches of the court and its staff had proceeded beyond that disclosed in the briefs of counsel" and that "further briefs and oral argument would have been a barren formalism without advantage to the court and counsel and a waste of time for all concerned."

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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